Volume 76
Issue 1 *Dickinson Law Review - Volume 76, 1971-1972*

10-1-1971

Recent Cases

Recent Cases

DIVORCE—CONSTITUTIONALITY OF A RESIDENCY REQUIREMENT IN A STATE DIVORCE LAW

Wymelenberg v. Syman, 328 F. Supp. 1353 (E.D. Wis. 1971).

In *Wymelenberg v. Syman*,[1] a three judge federal court[2] held that a provision of the Wisconsin Family Code[3] governing divorce actions which required that before an action for divorce could be commenced, one of the parties must have been a bona fide resident of Wisconsin for at least two years was unconstitutional in that it violated the guarantees of equal protection and due process of the fourteenth amendment of the United States Constitution.[4]

Plaintiff in the present case commenced an action for divorce on May 22, 1970.[5] As required by the provisions of the Wisconsin

---

1. 328 F. Supp. 1353 (E.D. Wis. 1971).

2. Jurisdiction was vested in the federal courts by 28 U.S.C. § 1343 (1962), 28 U.S.C. § 2201 (1959) and 42 U.S.C. § 1983 (1970). Pursuant to the requirements of 28 U.S.C. §§ 2281, 2284 (1965), this case was heard by a three judge panel.

3. *See generally* WIS. STAT. § 245.001 (Supp. 1971) *et seq.* The specific provision with which the court in *Wymelenberg* was faced (WIS. STAT. § 247.05(3) (Supp. 1971)) provides:

> Actions by or against residents for divorce. Regardless of where the cause of action arose, an action for divorce by or against a person who has been a bona fide resident of this state for at least two years next preceding the commencement of the action shall be commenced in the county of this state in which at least one of the parties has been a bona fide resident for not less than 30 days next preceding the commencement of the action.

[hereinafter cited as residency requirement]. The court in *Wymelenberg* did not strike down the 30 day provision of this statute. *See* note 98 and accompanying text *infra*.

4. Wymelenberg v. Syman, 328 F. Supp. 1353, 1354 (E.D. Wis. 1971).

5. *Id.* at 1354.

Family Code[6] covering divorce,[7] the Family Court Commissioner for Milwaukee County reviewed plaintiff's complaint and determined that neither the plaintiff nor his wife had satisfied Wisconsin's two year residency requirement.[8] The Commissioner notified the Circuit Judge of this fact and the plaintiff's divorce action was dismissed.[9]

Following dismissal of his divorce action plaintiff brought this action in federal court[10] against the Family Court Commissioner as

> [a] member of a class composed of bona fide residents of Wisconsin who meet all standards of eligibility for commencing a divorce action except that they have not been residents of the State of Wisconsin for at least two years prior to the commencement of an action to seek a divorce.[11]

The plaintiff sought to have the Wisconsin residency requirement declared invalid as a violation of due process and equal protection.

The decision by the court in *Wymelenberg* that a residency requirement in a state divorce statute is unconstitutional may be a landmark decision. The few previous challenges of residency requirements in divorce laws have been unsuccessful.[12] There is widespread acceptance of the proposition that it is within a state's power to impose a residency requirement on those seeking a divorce in its courts:

> [S]tates have the power to superimpose upon the fact of domicile or residence within the state a requirement that the domicile or residence continue for a certain period of time as a prerequisite to a divorce. . . .[13]

Almost all states have included some type of residency requirement in their divorce laws. Based on figures prepared by the United

---

6. *See generally* WIS. STAT. § 245.001 *et seq.*

7. *See generally* WIS. STAT. §§ 247.03-.39.

8. The Wisconsin Family Code (WIS. STAT. § 245.001 *et seq.*) requires the involvement of the Family Court Commissioner in divorce actions. In particular WIS. STAT. § 247.15 requires that the Commissioner advise the court as to the merits of a cause of action for divorce.

9. Wymelenberg v. Syman, 328 F. Supp. 1353, 1354 (E.D. Wis. 1971). Plaintiff's action for divorce was dismissed on the basis that the court "had no jurisdiction because plaintiff failed to fulfill the two year waiting period." *Id.* For further discussion of the concept that a court is without *jurisdiction* to grant a divorce when the plaintiff fails to satisfy a residency requirement *see* notes 89-92 and accompanying text *infra.*

10. Apparently plaintiff was seeking an order declaring the Wisconsin residency requirement invalid via a declaratory judgment (28 U.S.C. § 2201) and an injunction barring further enforcement of the statute (28 U.S.C. § 2281).

11. Wymelenberg v. Syman, 328 F. Supp. 1353, 1354 (E.D. Wis. 1971).

12. *See, e.g.*, Brown v. Brown, 123 So. 2d 382 (Fla. 1960); Robinson v. Robinson, 70 Idaho 122, 212 P.2d 1031 (1949); Hensley v. Hensley, 286 Ky. 378, 151 S.W.2d 69 (1941); Franklin v. Franklin, 40 Mont. 348, 106 P. 353 (1910); Worthington v. Worthington, 37 Nev. 212, 142 P. 230 (1914); Pugh v. Pugh, 25 S.D. 7, 124 N.W. 959 (1910).

13. 24 AM. JUR. 2d *Divorce and Separation* § 248 (1966). *See also* 27A C.J.S. *Divorce* § 75 (1959).

States Department of Labor for 1965, every state except New York has included a residency requirement in its divorce statute.[14] The length of time varies. Among the shortest are Arkansas (2 months)[15] and Utah (3 months).[16] The longest residency requirement is impossed by Massachusetts (5 years).[17] The most common residency requirement is one year (25 states)[18] although eight states have a residency requirement longer than one year.[19] Given the almost universal presence of residency requirements in divorce statutes, the impact of the *Wymelenberg* decision will be widespread if accepted in other jurisdictions.

Although the *Wymelenberg* decision is a radical departure from past judicial treatment of residency requirements in divorce statutes,[20] the court felt its holding was required in light of two recent United States Supreme Court decisions: *Boddie v. Connecticut*[21] and *Shapiro v. Thompson.*[22]

The *Shapiro* case dealt with several state statutes[23] which denied public assistance to applicants who had not resided in that state for at least one year immediately prior to applying for public assistance.[24] In *Shapiro* the United States Supreme Court held that

---

14. AM. JUR. 2d DESK BOOK, Doc. No. 125 (Supp. 1971); *See also* 24 AM. JUR. 2d, *Divorce and Separation* § 248 (1966) for a discussion of the various types of residency requirements imposed by the state divorce laws.
15. AM. JUR. 2d DESK BOOK, Doc. No. 125 (Supp. 1971).
16. *Id.*
17. *Id.*
18. *Id.* Included among those states which impose a one year residency requirement is Pennsylvania. PA. STAT. tit. 23, § 16 (Supp. 1971) provides:

> No spouse shall be entitled to commence proceedings for divorce by virtue of this act who shall not have been a bona fide resident in this Commonwealth at least one whole year immediately previous to the filing of his or her petition or libel: Provided, That, if the proceedings for divorce are commenced in the county where the respondent has been a bona fide resident at least one whole year immediately previous to the filing of such proceedings, in such case, residence of the libellant within the county or State for any period shall not be required.

19. AM. JUR. 2d, DESK BOOK, Doc. No. 125 (Supp. 1971).
20. *See* cases cited note 12 *supra.*
21. 91 S. Ct. 780 (1971).
22. 394 U.S. 618 (1969).
23. The three statutes under attack in *Shapiro* were those of Connecticut, CONN. GEN. STAT. REV. § 17-2d (Supp. 1965), the District of Columbia, D.C. CODE ANN. § 3-203 (1967), and Pennsylvania, PA. STAT. tit. 62, § 432(6) (1968).
24. 394 U.S. 618 (1969). The majority in *Shapiro* limited its decision to the facts before it. To emphasize this point the court stated:

> We imply no view of the validity of waiting-period *or* residence requirements determining eligibility to vote, eligibility for tuition-free education, to obtain a license to practice a profession, to hunt or fish and so forth. Such requirements may promote compelling

the statutes in question "penalized"[25] the exercise of a "fundamental right"[26] by a class of individuals dependent on public assistance. The fundamental right penalized was "the right to travel interstate."[27] Since a "fundamental right" was involved, the Court applied the strict "compelling state interest" test to determine if equal protection was being denied. The Court held that there was no "compelling state interest"[28] involved, therefore the imposition of a one year residency requirement as a precondition for receiving welfare benefits constituted a denial of equal protection.[29]

The second case which the *Wymelenberg* court deemed controlling was *Boddie v. Connecticut*.[30] In the *Boddie* case the United States Supreme Court held unconstitutional a provision of the Connecticut divorce law which made access to the courts for a divorce contingent on payment of various fees and costs.[31] The ma-

---

state interests on the one hand, or, on the other, may not be penalties upon the exercise of the constitutional right of interstate travel.

Id. at 638 n.21. For a further discussion of the impact of *Shapiro* despite the Court's limitation of its holding, *see* note 62 *infra*.

25. 394 U.S. at 634. In speaking of "penalizing" the right to travel the majority has caused great confusion among the courts and commentators concerning what effect on the right to travel will be unconstitutional. This problem is discussed at notes 65-73 and accompanying text *infra*.

26. 394 U.S. 618, 630 (1969). The term "fundamental right" has been used in treatment of constitutional challenges based on equal protection. In cases where a "fundamental" right is affected the traditional test for equal protection i.e., the "rational basis" test has been discarded in favor of the stricter test of whether the state interest being promoted is a compelling one. For an excellent discussion of the development of the "compelling interest" test and the decline of the "rational basis" test *see* Mr. Justice Harlan's dissenting opinion in *Shapiro*, 394 U.S. 618, 658-62 (1969). *See also Developments In The Law—Equal Protection*, 82 HARV. L. REV. 1065 (1969).

27. 394 U.S. 618, 630 (1969). The majority provides little in the way of the background of the right to travel. In fact, the majority found that it was unable to "ascribe the source of this right to travel interstate to a particular constitutional provision." *Id.* at 630 (footnotes omitted). For a more complete development of the background of the "right to travel interstate" *see* Mr. Justice Harlan's dissenting opinion in *Shapiro*. *Id.* at 663-667. *See also Developments In The Law—Equal Protection*, 82 HARV. L. REV. 1065 (1969).

It is interesting that the majority devoted so little concern to the meaning of the "right to travel interstate." It appears that Mr. Chief Justice Warren, with whom Mr. Justice Black joined in dissenting from the holding in *Shapiro*, 394 U.S. 618 (1969) was correct when he stated:

> The Courts decision reveals only the top of the iceberg. Lurking beneath are the multitude of situations in which States have imposed residence requirements including eligibility to vote, to engage in certain professions or to attend a state supported university.

Id. at 655.

28. 394 U.S. 618 (1969). The interests which the states argued were "compelling" were mainly concerned with fiscal integrity. *Id.* at 638. The states also argued that the residency requirements encouraged early entry into the labor force by new arrivals. *Id.* at 639. Finally it was asserted that the residency requirements prevented welfare fraud by new arrivals, *i.e.*, prevented an individual from receiving welfare payments from more than one state at one time. *Id.* at 634.

29. 394 U.S. 618 (1969).

30. 91 S. Ct. 780 (1971).

31. The fees involved in the *Boddie* case were required by CONN. GEN.

jority[32] held that because the Connecticut statutes in effect denied indigents the right to obtain a divorce, they constituted a denial of due process.[33] The majority rested its decision on several elements unique to divorce. Among these was the basic importance of marriage in our society.[34] The court spoke of marriage as a "fundamental human relationship."[35] Also of significant importance to the majority was the fact that the state had monopolized all viable means of dissolving the marriage relationship.[36] Since there were no meaningful alternatives to divorce, anyone seeking to dissolve his marriage was forced to utilize the judicial machinery. The majority concluded that denying access to the courts, the only means of obtaining a divorce, because of indigency constituted a denial of due process.[37]

The *Wymelenberg* court rested its decision primarily on the *Boddie* and *Shapiro* decisions. The court first recognized that as in *Boddie* and *Shapiro*, a discriminatory classification had been created by the Wisconsin residency requirement. In the words of the court:

> In the case at hand, Wisconsin by legislation has granted access to its divorce courts to "bona fide residents" who have lived in the state for at least two years but has denied similar access to "bona fide residents," such as plaintiff, who have not yet lived in the state for that length of time.[38]

The court described this discrimination as affecting those who

---

STAT. REV. § 52-259 (Supp. 1971-72) (filing fees) and the costs were those required for service. CONN. GEN. STAT. REV. § 52-261 (Supp. 1971-72).

32. 91 S. Ct. 780, 783-89 (1971).

33. *Id.* Although the majority in *Boddie* rested its decision solely on a due process argument, the concurring opinions questioned this reasoning. Mr. Justice Douglas felt that the basis for the decision should be only equal protection. *Id.* at 789-90 (concurring opinion). Mr. Justice Brennan agreed with the majority that due process had been violated, but added that so had the constitutional guarantee of equal protection. *Id.* at 790-92 (concurring opinion).

34. 91 S. Ct. 780, 784, 788 (1971). For further examples of cases which have held that marriage in our society will be protected from encroachment *see* Loving v. Virginia, 388 U.S. 1, 12 (1967); Skinner v. State of Oklahoma, 316 U.S. 535, 541 (1942); Meyer v. State of Nebraska, 262 U.S. 390 (1923); Maynard v. Hill, 125 U.S. 190, 205 (1888).

35. 91 S. Ct. 780, 788 (1971).

36. *Id.* at 784-85. Mr. Justice Brennan in his concurring opinion, *id.* at 790-92, criticized the court for its dependence on the idea that this case was special because the state held a monopoly over the means of dissolving the marital relationship. *Id.* at 791.

37. For a discussion of the holding in *Boddie see, e.g.*, Gold, *The Poor And Divorce: Boddie v. Connecticut*, 3 FAMILY L.J. 281 (1969).

38. 328 F. Supp. 1353, 1354-5 (E.D. Wis. 1971).

"have recently moved into the jurisdiction."[39]

In applying the *Boddie* rationale to this type of discrimination, the *Wymelenberg* court reiterated the *Boddie* emphasis on the rights being affected. Speaking of marriage in terms such as "a fundamental human relationship"[40] and one of the "basic civil rights of man,"[41] the court paraphrased *Boddie* by stating:

> Thus, when the state, exercising its established prerogative of overseeing this most important social institution, chooses to limit access to the courts in this area to only one segment of its citizenry, the court is duty bound to carefully weigh the rationales for such limitations and to investigate whether adequate alternatives are available either to the state or to its citizens.[42]

The court pointed out that no meaningful alternatives to a divorce existed in Wisconsin. The court noted that a "physical separation either formal or informal cannot be said to be a meaningful alternative to a divorce. . . ."[43] The court pointed out that a physical separation in no way terminates the marital relation.[44] Similarly, the court rejected annulment as a meaningful alternative to divorce since the grounds for a divorce and annulment are significantly different in Wisconsin.[45]

The *Wymelenberg* court stated that, as in *Boddie*, the proper constitutional standard by which to test the Wisconsin residency requirement against the requirements of due process was the "overriding significance test."[46] But, unlike the majority in *Boddie*, the *Wymelenberg* court implied that the Wisconsin residency requirement was also a denial of equal protection.[47] Although only discussing this idea in a note, the court stated that *Boddie* stands for the proposition that "access to the divorce courts" is a "fundamental right" and as such can only be limited if the state interest being promoted is a "compelling" interest.[48]

---

39. *Id.* at 1355.
40. *Id.* at 1354.
41. *Id.*
42. *Id.*
43. *Id.* at 1355.
44. Limiting a plaintiff to a physical separation, formal or informal has serious practical ramifications. The duty of support will be affected as well as the right to remarry. Furthermore a child born to the wife even while separated from her husband will generally be presumed to be the husband's child.
45. 328 F. Supp. 1353, 1355 (E.D. Wis. 1971).
46. *Id.* at 1356 n.7. The approach to a question involving due process is to measure the rights affected against the interest which the state has in mind in enacting the statute. Where rights protected by the due process clause of the fourteenth amendment are restricted, the statute will be stricken "absent a countervailing state interest of overriding significance. . . ." *Id.* For a further discussion of the scope of the due process clause and the very real conflict among the authorities on this subject, *compare* the majority opinion in Boddie v. Connecticut by Mr. Justice Harlan *with* the concurring opinion of Mr. Justice Douglas. 91 S. Ct. 780, 789 (1971).
47. 328 F. Supp. 1353, 1356 n.6 (E.D. Wis. 1971).
48. *Id.* For a discussion of the question of equal protection *see* note 26 *supra.*

Several interesting issues arise from the *Wymelenberg* court's application of the *Boddie* rationale. First, the mention of *Boddie* as authority for an equal protection argument is not supported by the majority opinion in *Boddie*.[49] The majority in *Boddie* limited its discussion to the due process issue. The only authority for an equal protection argument is found in the concurring opinions of Mr. Justice Douglas[50] and Mr. Justice Brennan.[51] Furthermore, the equal protection violation pointed out by both Mr. Justice Douglas and Mr. Justice Brennan in *Shapiro* was the fact that access to the courts was being limited on the basis of wealth.[52] In the present case, the limitation is based on length of residence. Whether an equal protection argument based solely on discrimination arising from length of residence (absent the arguments presented in *Shapiro* regarding the right to travel[53]) and affecting access to the divorce courts would be accepted by the courts has not been conclusively decided.[54]

Secondly, the applicability of *Boddie* to the due process argument in Wymelenberg is also questionable. In *Boddie*, the effect of the Connecticut statutes could readily be seen as a permanent exclusion from the divorce courts. Access to the court was conditioned on the ability to pay, and it is conceivable that a large number of indigents would *never* be able to afford a divorce. However, in *Wymelenberg*, the maximum exclusion from the divorce courts is two years. Such a difference may be sufficient to distinguish the two cases. The majority in *Boddie* did limit its decision:

> We do not decide that access for all individuals to the courts is a right that is, in all circumstances, guaranteed by the Due Process Clause of the Fourteenth Amendment so that its exercise may not be placed beyond the reach of any individual. . . .[55]

Furthermore, as pointed out by Mr. Justice Black, in his dissenting opinion in *Boddie*, the decision by the majority is an expansion of due process.[56] Whether the Court will limit any extension of *Boddie* remains to be seen.

The court in the present case had little difficulty in applying

---

49. 91 S. Ct. 780, 783-89 (1971).
50. *Id.* at 789-90 (concurring opinion).
51. *Id.* at 790-92 (concurring opinion).
52. *Id.* at 790, 791 (concurring opinion).
53. *See* note 27 and accompanying text *supra*.
54. *See* cases cited note 63 *infra* wherein even when the question of a "right to travel" (*Shapiro*) was raised, discrimination based on length of residency was held to be constitutionally permissible.
55. 91 S. Ct. 780, 788 (1971).
56. *Id.* at 792-94 (dissenting opinion).

the rationale of *Shapiro v. Thompson.*[57] The court noted that the discrimination worked by the Wisconsin residency requirement was against those who "have recently moved into the jurisdiction."[58] Thus, the court concluded that according to the holding in *Shapiro,* the Wisconsin residency requirement affected a "fundamental right,"[59] that being "the right to travel interstate."[60] Therefore, to satisfy the requirements of equal protection, Wisconsin would have to show that its residency requirement promoted a "compelling state interest."[61]

The *Wymelenberg* court offers no discussion of the background of the "fundamental right to travel interstate" nor does it cite any other cases which have applied the *Shapiro* rationale. The effect of the United States Supreme Court's application of the "right to travel" in Shapiro has had a devastating effect on residency requirements of all types.[62] However, it is not beyond dispute that the *Shapiro* holding mandates that every residency requirement, including the one in the present case be struck down as unconstitutional.[63]

As noted above, the majority in *Shapiro* limited its decision to residency requirements related to the receipt of public assistance, and expressly avoided a holding that *all* residency requirements were unconstitutional.[64] Courts have therefore, when faced with a residency requirement question, been forced to analyze just how far the *Shapiro* decision expands the "right to travel interstate."

At one point in the *Shapiro* decision the Court speaks of residency requirements which "penalize"[65] the right to travel. Taken literally it is plain to see that all residency requirements in effect "penalize" the right to travel. One commentator has suggested that

---

57. 394 U.S. 618 (1969).
58. Wymelenberg v. Syman, 328 F. Supp. 1353, 1355 (E.D. Wis. 1971).
59. *Id.* at 1356 n.6.
60. *Id.* For a discussion of the background of the "fundamental right to travel interstate" *see* note 27 *supra.*
61. 328 F. Supp. 1353, 1356 n.6 (E.D. Wis. 1971). For a discussion of the development of the "compelling interest" test *see* note 26 *supra.*
62. *See, e.g.,* Cole v. Housing Authority of City of Newport, 435 F.2d 807 (1st Cir. 1970) (two year residency requirement imposed on applicants for admission to federally-aided, low rent, public housing unconstitutional); Bufford v. Holton, 319 F. Supp. 843 (E.D. Va. 1970) (one year residency requirement to vote in general election unconstitutional); Keenan v. North Carolina Board of Law Examiners, 317 F. Supp. 1350 (D.N.C. 1970) (residency requirement to take bar examination unconstitutional); Arnold v. Halifax Hospital District, 314 F. Supp. 277 (M.D. Fla. 1970) (residency requirement for free medical assistance unconstitutional).
63. Various cases have rejected the applicability of the *Shapiro* and held residency requirements constitutional. *See, e.g.* Lane v. McGarry, 320 F. Supp. 562 (N.D.N.Y. 1970) (upholding one year residency requirement for admission to public housing); Howe v. Brown, 319 F. Supp. 862 (N.D. Ohio 1970) (residency requirement for statewide non-presidential election constitutional).
64. *See* note 24 *supra.*
65. 394 U.S. 618, 631, 634 (1969).

the majority in *Shapiro* did not intend such a broad holding.[66] Besides the expression that they did not infer by their decision that *every* residency requirement was unconstitutional,[67] the majority emphasized the very real deterrent effect of the statutes under discussion. The majority stated:

> We do not doubt that the one year waiting period device is well suited to discourage the influx of poor families in need of assistance. An indigent who desires to migrate, resettle, find a new job, and start a new life will doubtless hesitate if he knows that he must risk making the move without the possibility of falling back on state welfare assistance during his first year of residence when his need may be most acute.[68]

Therefore it is not enough that the right to travel be in some way affected or "penalized." There must be a real possibility of deterrence. This argument is based on *Shapiro's* emphasis on the importance of welfare to an indigent, comprising "the ability of the families to obtain the very means to subsist. . . ."[69] Thus, the right to travel is not merely penalized, but due to the essential nature of the underlying interest affected (in the *Shapiro* case—welfare), the right to travel is actually deterred. In other words,

> By relying on the fact that the classification deterred rather than penalized the exercise of the right to travel, the Court has limited the application of its reasoning to those cases where the underlying benefit is fundamental in nature.[70]

Applying this approach to *Wymelenberg*, the question is not merely whether the right to travel is "penalized." Obviously it is. The inquiry should be, is there any real deterrent effect, or conversely, is access to the divorce courts so essential that sufficient deterrence as opposed to a mere penalty can be inferred. If this approach is adopted, the issue would be whether or not the right to travel is deterred by the imposition of a two year residency requirement in a divorce statute.

The interpretation of *Shapiro* outlined above has been rejected by some courts[71] but seemingly accepted by others.[72] Several courts

---

66. Note, *Shapiro v. Thompson: Travel Welfare and the Constitution*, 44 N.Y.U. L. REV. 989 (1969).
67. *See* note 24 *supra.*
68. 394 U.S. 618, 629 (1969).
69. *Id.* at 627.
70. Note, *Shapiro v. Thompson: Travel Welfare and the Constitution,* 44 N.Y.U. L. REV. 989, 1003 (1969).
71. In Cole v. Housing Authority of City of Newport, 435 F.2d 807 (1st Cir. 1970), the court discussed and rejected the concept of limiting *Shapiro*

have defined *Shapiro* only as authority for the proposition that any residency requirement whose *purpose* is to exclude a class of individuals from the state is unconstitutional, and avoided the question of what type of underlying right is affected by a limitation of the right to travel.[73] Perhaps the only safe conclusion in light of the above rationale is that at the present time residency requirements cannot be defined as unconstitutional per se on the basis of *Shapiro*.[74]

Adopting the reasoning in both *Boddie* and *Shapiro* which requires a state interest to be "a countervailing state interest of overriding significance"[75] if tested against the requirements of due process, or to be a "compelling interest"[76] if tested against the requirements of equal protection, the *Wymelenberg* court reviewed four interests offered by Wisconsin to justify the residency requirement.

The first reason offered by the state was "to deter those with marital problems from entering the state."[77] The *Wymelenberg* court quickly disposed of this state interest. Citing *Shapiro*, the court stated, "it is impermissible for a state to attempt to chill an individual's constitutional right to travel and settle in the state of his choice."[78] It is interesting to note that at no time in *Shapiro*

---

to cases wherein the underlying interest affected is essential, e.g. public assistance. The court stated:

> Because the Court has shown no inclination to look to the difficult factual issue of whether or not a fixed level of deterrence exists and because it does not restrict its ruling in Shapiro to situations where the necessities of life are involved, we are inclined to reject [the] presumption of deterrence and adopt instead the Court's suggestion that restrictions which penalize travel require a compelling state interest.

Id. at 810 n.9. *See also* Kohn v. Davis, 320 F. Supp. 246 (D. Vt. 1970) (one year residency requirement as prerequisite to right to vote held unconstitutional).

72. In Kirk v. Board of Regents of Univ. of California, 273 Cal. App. 2d 430, 78 Cal. Rptr. 260 (1969), *appeal dismissed*, 396 U.S. 554 (1970), a statute which required a one year residency before a student would be eligible for a reduced tuition was held constitutional. Although the right to travel was not the only issue raised in the case, the court did discuss the applicability of *Shapiro*. The court held that the right to travel was not deterred by the residency requirement. *Id.* at 266. Of importance to the present case was the fact that the court distinguished the *Shapiro* case by examining the underlying rights affected, *i.e.* reduced tuition versus welfare. The court felt this was a controlling distinction. *Id.* at 267. *See also*, Board of Supervisors, Pima County v. Robinson, 10 Ariz. App. 238, 457 P.2d 951 (1969), *vacated as moot*, 105 Ariz. 280, 463 P.2d 536 (1970) (holding unconstitutional a residency requirement for free out-patient medical care).

73. *See, e.g.*, Howe v. Brown, 319 F. Supp. 862 (N.D. Ohio 1970) (upholding one year residency requirement for voting); Vaughn v. Bower, 313 F. Supp. 37 (D. Ariz. 1970).

74. For further discussion of the holding in *Shapiro see, e.g.*, Rosenheim, *Shapiro v. Thompson: "The Beggars Are Coming To Town,"* THE S. CT. REV. at 303 (1969); 21 SYRACUSE L. REV. 303 (1969).

75. *See* note 46 and accompanying text *supra.*

76. *See* note 28 and accompanying text *supra.*

77. Wymelenberg v. Syman, 328 F. Supp. 1353, 1355 (E.D. Wis. 1971).

78. *Id.* at 1355.

did the states allege that their purpose in adopting the residency requirements was to deter entry of indigents into the state. It was the Supreme Court's own conclusion that such an intent existed. The majority in *Shapiro* stated, "there is weighty evidence that exclusion from the jurisdiction of the poor who need or may need relief was the specific objective of these provisions."[79] Although the Court in *Shapiro* attacked the residency requirements for such an intent stating, "the purpose of inhibiting migration by needy persons into the State is unconstitutionally impermissible,"[80] the applicability of the *Shapiro* case is still open to question. It is clear that in *Shapiro* the Court did not strike down the residency requirements merely because it found that its purpose was to exclude indigents. Furthermore, as discussed above, several courts have suggested that it is the underlying right which is affected and not merely the penalizing of the right to travel which is controlling.[81]

A second interest offered by Wisconsin in the present case was "to maintain marital stability."[82] The state argued that the residency requirement served as a "waiting period" prior to obtaining a divorce. The court responded to this contention by stating that "this logic would also require a similar waiting period for long term residents of the State."[83] Although never mentioned by the court, Wisconsin has a 60 day waiting period in its divorce laws[84] and also provides for the Family Court Commissioner to attempt reconciliation.[85] The court also suggests that it would be permissible to impose a waiting period running from the date of marriage within which no action for divorce could be commenced.[86] Such a waiting period would promote marital stability and in no way discriminate against those who have recently moved into the jurisdiction.[87]

The third interest offered by the state was that the residency requirement was justifiable as evidence of domicile.[88] The *Wymelenberg* court offered several observations with regard to this "interest." First, the court noted that according to Wisconsin case

79. 394 U.S. 618, 628 (1969).
80. *Id.* at 629.
81. *See* note 72 and accompanying text *supra.*
82. 328 F. Supp. 1353, 1355 (E.D. Wis. 1971).
83. *Id.* at 1355.
84. WIS. STAT. § 247.081(2)a (Supp. 1971).
85. WIS. STAT. § 247.15(1) (Supp. 1971).
86. 328 F. Supp. 1353, 1355 (E.D. Wis. 1971).
87. For a discussion of various statutory plans involving "cooling off" periods or waiting periods *see* Annot., 62 A.L.R.2d 1262 (1958).
88. 328 F. Supp. 1353, 1355 (E.D. Wis. 1971).

law, a two year residency before jurisdiction over the divorce action will vest in the Wisconsin courts was separate and distinct from the requirement that the party be a domiciliary of the state.[89] Although the court did not expand on this point,[90] it is important to the present case as well as any future cases of this nature. The general rule with regard to state court jurisdiction over a divorce action is:

> A court must have jurisdiction of the res, or the marriage status, in order that it may grant a divorce. The res or status follows the domicile of the spouses; and therefore, in order that the res may be found within the state so that the courts of the state may have jurisdiction of it, one of the spouses must have a domicile within the state.[91]

Since, domicile is the key to jurisdiction of a state court, a requirement of residence in a non-domiciliary degree should in no way affect jurisdiction.

The court noted the necessity of domicile as a jurisdictional prerequisite but rejected the mandatory two year residency requirement as the only means of establishing legal residence.

> [E]ven if it is conceded that waiting periods are of some evidentiary value in determining domicile, under this rationale § 247.05(3) [the two year residency requirement] would amount to an irrebutable presumption that a domicile cannot be established in less than two years. "Far less drastic means" of determining domicile are available to a trial court possessing full subpoena powers and the advices of a Family Court Commissioner.[92]

Even in those states in which the divorce statutes speak only of "residency" requirements, as opposed to domicile, as a basis for jurisdiction of the courts, the reasoning of *Wymelenberg* will still be applicable. The general rule is that "[t]he term 'residence' as used in statutes stating the prerequisites for the maintenance of a divorce action, is usually construed as equivalent to domicile."[93] Therefore, the *Wymelenberg* holding that "an irrebuttable presumption that a domicile cannot be established in less than two years,"[94] would be equally applicable.

The final interest which Wisconsin proposed was treated by the court in a similar manner. The state argued that its "reputa-

---

89. *Id.* at 1355.

90. The court implies consideration of this factor in its discussion of the states fourth "interest." *See* text accompanying note 95 *infra.*

91. 12 AM. JUR. 2d *Divorce and Separation* § 246 (1966) (footnotes omitted). *See also,* 27A C.J.S. *Divorce* § 71a (1959).

92. 328 F. Supp. 1353, 1355 (E.D. Wis. 1971) (footnotes omitted).

93. 27A C.J.S. *Divorce* § 71b (1959). *See also,* 12 P.L.E. *Divorce* § 2 (1959). In discussing the Pennsylvania one year residency requirement (PA. STAT. tit. 23, § 16 (Supp. 1971)) the authors state: "The statute, in using the term "residence," means domicile, which is dependent upon both the actual residence and the intent of the plaintiff." *Id.* (footnotes omitted).

94. 328 F. Supp. 1353, 1355 (E.D. Wis. 1971).

tion will suffer as it will become a quickie divorce mill." The court, defining a "quickie divorce mill" as a "jurisdiction which grants divorces to visitors as opposed to permanent residents or domiciliaries," held that such a result could be easily avoided by applying the law of domicile.[95]

The court concluded its examination of the four state interests by stating:

> [T]he prior mandates of the United States Supreme Court compel us to find, whether judged by the equal protection clause "compelling interest" test or by the due process clause "overriding significance" test that § 247.05(3)'s two year waiting period requirement constitutes an unconstitutional impingement upon the Fourteenth Amendment of the United States Constitution.[96]

By such a blanket statement the court avoided the task of specifying which state interests failed under due process and which failed under equal protection.[97] Also, it is impossibile to determine if the court felt *Boddie* (due process) or *Shapiro* (equal protection) controlled via a combination of the decisions, or whether each decision by itself mandated the *Wymelenberg* holding.

As noted earlier, the number of states with residency requirements is high. The effect on these states remains to be seen. If the *Wymelenberg* decision is followed, the state will have several options. As suggested in *Wymelenberg*, the law of domicile should prevent a state from being forced to grant divorces to mere visitors. In uncontested divorces the state may wish to devise stricter tests of domiciliary intent. Whether a state under the *Wymelenberg* reasoning will be able to impose any type of residency requirement as proof of domicile remains to be seen. The *Wymelenberg* court specifically exempted the 30 day provision in § 247.05(3).[98] How long a period could be demanded as evidence of domicile remains unanswered.

In conclusion, it is important to recognize that the *Wymelenberg* decision may be subject to attack. As noted throughout, the *Wymelenberg* court ignored numerous issues raised by other cases

---

95. For an examination of evidentiary questions in establishing domicile see RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 11-23 (1971).

96. 328 F. Supp. 1353, 1356 (E.D. Wis. 1971) (footnotes omitted).

97. Considering the apparent confusion within the United States Supreme Court over what constitutes a denial of due process and what constitutes a denial of equal protection, the courts action is understandable. *See, e.g., Developments In The Law—Equal Protection*, 82 HARV. L. REV. 1065 (1969).

98. 328 F. Supp. 1353, 1354 n.2 (E.D. Wis. 1971). *See* note 3 *supra*.

which have attempted to apply both *Boddie* and *Shapiro*. The resolution of these issues will determine the validity of the *Wymelenberg* decision.

G. David Pauline

CONSTITUTIONAL LAW—WARRANTLESS TAKING OF BLOOD SAMPLE INCIDENT TO ARREST

Commonwealth v. Murray, 441 Pa. 22, 271 A.2d 500 (1970).

In *Commonwealth v. Murray*,[1] the Pennsylvania Supreme Court strictly applied the present United States Supreme Court standards for testing the validity of a warrantless search incident to arrest. The court held that the taking of a blood sample without a search warrant thirteen days prior to the serving of an arrest warrant violated the fourth amendment prohibition against unreasonable searches.[2] The majority and dissenting opinions clearly reflected the current controversy with respect to the proper interpretation of the fourth amendment.

Petitioner Robert Murray crossed the center line of a highway and collided head-on with another vehicle containing a driver and one passenger. Both occupants of the other car died a few hours later. The state trooper who investigated the accident found beer bottles in the Murray car and testified that "he and the car reeked with alcohol."[3] The trooper sent the severely injured but conscious Murray to the hospital and remained at the scene of the accident to complete his investigation and traffic duties. However, he radioed the police station and asked that the hospital be instructed to make a blood test on Murray.

A blood sample was taken approximately one hour and forty minutes after the accident.[4] This was done without placing Murray under arrest, without his consent,[5] and without a search

---

1. 441 Pa. 22, 271 A.2d 500 (1970).
2. U.S. CONST. amend. IV provides in part:
   The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable search and seizure shall not be violated.
3. Commonwealth v. Murray, 19 Cumb. 2, 3 (Pa. C.P. 1968).
4. *See* note 24 *infra* for information on rate at which alcohol is eliminated from the blood stream.
5. This prosecution arose before the passage of the Pennsylvania Implied Consent Law. PA. STAT. ANN. tit. 75, § 624.1 (Supp. 1971). Whether the defendant in *Murray* would be permitted to avail himself of that statute is an open question. Part (a) of the statute states that the statute specifically applies to persons "charged with the operation of a motor vehicle or tractor while under the influence of intoxicating liquor." Murray was charged with involuntary manslaughter.
   The statute also provides:
   If for any reason a person is unable to supply enough breath to complete a chemical test a physician or a technician acting under

warrant. Tests on the sample showed an alcohol content of 2.06 milligrams per cubic centimeter.[6] A complaint was filed the following day and a warrant for Murray's arrest issued. However, Murray was not served with the warrant until he was discharged from the hospital thirteen days after the accident.

A pretrial motion to suppress the blood test evidence was denied. An objection to the evidence at trial was overruled and Murray was found guilty. A motion for a new trial was denied.[7] The defendant appealed to the Pennsylvania Superior Court which affirmed the decision of the lower court *per curiam* without opinion.[8]

The Pennsylvania Supreme Court, in a four to three decision, reversed the decision of the superior court and ordered a new trial.[9] The majority strictly applied the present search and seizure doctrine that a search incident to arrest must be substantially contemporaneous with the arrest.[10] The dissenting opinion of Mr. Justice Pomeroy, which was joined by Mr. Justice Jones and Mr. Justice Bell, stated that the conduct of the police in the present case was reasonable under the circumstances and should be judged by standards of reasonableness.[11] The majority and dissenting opinions present two views of the proper interpretation of the unreasonable search and seizure clause of the fourth amendment.

A brief survey of major United States Supreme Court decisions concerning warrantless search incident to arrest, with stress on

---

his direction may withdraw blood for the purpose of determining the alcoholic content therein. Consent is hereby given by such persons. The chemical analysis of the blood taken under such circumstances shall be admissible in evidence.

PA. STAT. ANN. tit. 75 § 624.1(f) (Supp. 1971). This provision might have been applied in *Murray* since the left side of the defendant's face was crushed and facial bones broken. 19 Cumb. 2, 3 (Pa. C.P. 1968).

In California, where the crime of driving while intoxicated and thereby proximately causing bodily injury to another is a felony, it has been held that a blood test can be lawfully made in such circumstances despite the California implied consent law and defendant's express objection to the test. People v. Fite, 267 Cal. App. 2d 685, 73 Cal. Rptr. 666 (1968).

For a complete analysis of the Pennsylvania Implied Consent Law *see* Comment, *The Pennsylvania Implied Consent Law: Problems Arising in a Criminal Proceeding*, 74 DICK. L.R. 219 (1970).

6. Therefore the amount of alcohol by weight in the blood was 0.206 per cent. At the time of this prosecution, a person was presumed to be under the influence of intoxicating liquor if his blood-alcohol level was 0.15 per cent or more. Act of July 28, 1961, No. 399, [1961] Pa. Laws 918. This presumption now applies if the amount of alcohol in the blood is 0.10 per cent or more. PA. STAT. ANN. tit. 75 § 624.1(c) (Supp. 1970).

7. Commonwealth v. Murray, 19 Cumb. 2 (Pa. C.P. 1968).

8. Commonwealth v. Murray, 215 Pa. Super. 745, 255 A.2d 594 (1969).

9. Upon retrial, Murray was again convicted on the basis of eye witness testimony. No. 11 (Cumb. Co. O & T, Mar. Sess. 1968).

10. Commonwealth v. Murray, 441 Pa. 22, 25, 271 A.2d 500, 501 (1970). *See* notes 16-21 and accompanying text *infra*.

11. *Id.* at 26, 271 A.2d at 502. *See* notes 45-47 and accompanying text *infra*.

cases where a blood sample was taken, will place the *Murray* decision in proper perspective. Prior to *Mapp v. Ohio*,[12] the only Constitutional protection afforded citizens in state courts against unreasonable search and seizure was the due process clause of the fourteenth amendment. It protected all citizens from searches of the person done in a manner that shocked the conscience or offended a sense of justice.[13] On the basis of this test the Court allowed the warrantless taking of blood incident to arrest in *Breithaupt v. Abram*.[14] *Mapp* applied the exclusionary rule, that evidence obtained in violation of the fourth amendment must be suppressed, to all state criminal prosecutions.[15]

Of the various requirements that a search incident to arrest must now meet, the one most relevant to *Murray* was the specification set down in *Stoner v. California*[16] that the "search can be incident to an arrest only if it is substantially contemporaneous with the arrest and confined to the immediate vicinity of the arrest."[17] The Court stated that while there is some leeway in these concepts, the search of defendant's hotel room in California two days before he was arrested in Nevada was unrelated in both time and place to the arrest.[18] Recent cases that have held searches invalid for violation of the time and place requirement have tended to place more emphasis on the place than the time.[19] A Supreme Court case decided after *Mapp*, *Schmerber v. California*, had facts very close to *Murray*, yet made no mention of the time requirement.[20] Therefore the Pennsylvania Supreme Court had

12. 367 U.S. 643 (1961).
13. Rochin v. California, 342 U.S. 165, 172-73 (1962) (conviction based on evidence obtained by pumping defendant's stomach overturned).
14. 352 U.S. 432 (1957). The opinion placed special emphasis on the fact that blood tests are routine in today's medical procedure and are required in many physical examinations. *Id.* at 436. Slaughter on the highways and the prominent role played by the drunk driver in this carnage were also mentioned as reasons for holding that the warrantless taking of a blood sample was not violative of the fourteenth amendment. 352 U.S. at 440.
15. 367 U.S. 643, 660 (1961).
16. 376 U.S. 483 (1964).
17. *Id.* at 486.
18. *Id.* at 487.
19. Vale v. Louisiana, 399 U.S. 30 (1970) (Defendant was arrested on the front steps of his house; a search of the entire house was held not incident to the arrest); Shipley v. California, 395 U.S. 818 (1969) (Defendant was arrested at the curb in front of his house; a search of the house 15 or 20 feet away was held not incident to the arrest). *See also* Warden, Maryland Penitentiary v. Hayden, 387 U.S. 294 (1967) and James v. Louisiana, 382 U.S. 36 (1965). All cases cited the time and place requirement from *Stoner*.
20. Schmerber v. California, 384 U.S. 757 (1966). *See* notes 22-27 and accompanying text *infra*.

little clear precedent for approving or disapproving the thirteen day lapse in *Murray*.[21]

The United States Supreme Court examined the validity of a warrantless taking of blood incident to an arrest after fourth amendment protection was made applicable to state criminal prosecutions. In *Schmerber v. California*,[22] the Court ruled that such a search is valid under certain circumstances.[23] It held that a warrantless search incident to arrest was permissible when it was reasonably apparent that the defendant was intoxicated and that the blood alcohol would begin to decrease before a warrant could be obtained.[24]

The Court took judicial notice of the fact that the percentage of blood alcohol diminishes shortly after drinking stops.[25] The opinion in *Schmerber* emphasized that it was applicable only to situations where the blood was taken in a hospital according to accepted medical practices.[26] The policy arguments set down in *Breithaupt v. Abram*[27] were cited to support the contention that intrusion into a person's body for blood is not repugnant to the fourth amendment.

In *Commonwealth v. Murray*, the majority opinion of the Pennsylvania Supreme Court cited *Schmerber* as authorizing a blood test made without the consent of the defendant. However the majority did not find that *Schmerber* was controlling in this

---

21. For cases dealing with time delays of similar length, *see* note 40 and accompanying text *infra*.

22. 384 U.S. 757 (1966).

23. *Id.* In *Schmerber*, the defendant was taken to a hospital for treatment of injuries suffered in an automobile accident. A blood sample was taken at the hospital without a search warrant and despite the defendant's refusal to consent. The evidence was admitted at trial and the defendant was convicted of driving while under the influence of intoxicating liquor. The Supreme Court affirmed the conviction, holding that the conduct of the police was justified by the circumstances of the case. However, this case can be distinguished from *Murray* since the defendant had been placed under arrest at the scene of the accident.

24. *Id.* at 770. The principle that a warrantless search incident to arrest may be made to prevent destruction of the evidence has most recently been stated in Chimel v. California, 395 U.S. 752, 758 (1969). *See also* Preston v. United States, 376 U.S. 364, 367 (1964).

25. *Id.* at 771. The rate at which blood-alcohol diminishes varies with such facts as the amount of food in the stomach. However, the following information presents general limits and rates:

> Total absorption [of alcohol into the blood stream] will ordinarily be completed between 40 and 70 minutes after the final drink. The rate of elimination from the bloodstream after absorption varies from person to person. Generally, though, the average person of 150 pounds of body weight will eliminate about 1/3 fluid ounce of *absolute alcohol* per hour and accordingly the concentration of alcohol in the blood will decrease by approximately 0.015 per cent per hour.

R.L. DONIGAN, CHEMICAL TESTS AND THE LAW 44 (2d ed. 1966). *See generally* AMERICAN MEDICAL ASSOCIATION, ALCOHOL AND THE IMPAIRED DRIVER (1968).

26. *Id.* at 772.

27. *See* note 13 *supra*.

case. The court held that this search was *not* incident to a lawful arrest. It should be noted, however, that the lower court found that all of the technical requirements of *Schmerber* were satisfied. The taking of Murray's blood was done in a reasonable and proper manner by a trained medical technician in a hospital;[28] the facts clearly justified the reasonable belief on the part of the police that probable cause for the search existed;[29] and the situation was an emergency which demanded quick action less the evidence forever disappear.[30] The dissenting opinion of Mr. Justice Pomeroy also concluded that *Schmerber* was applicable to this case.[31]

The majority of the supreme court in *Murray* was able to dispense with the case by strictly interpreting the requirement that the warrantless search be substantially contemporaneous with the arrest in order to be valid. The opinion stated that:

> While the exigencies of the existing circumstances may render the search valid even if not strictly contemporaneous with the arrest, the present situation is not such a case. Although the altruistic motives of the arresting officer are to be admired, this, in itself, cannot warrant the conclusion that the search of Murray's person thirteen days before the arrest was an "incident" thereto.[32]

Thus the majority did not believe the facts of this case compelled a finding that the police had no other reasonable course but to delay the execution of the warrant.[33]

A recent Pennsylvania case, *Commonwealth v. Gordon*,[34] cited by the majority[35] and the dissent[36] presents an example of "circumstances which will render a seizure reasonable, even though it is not strictly confined to the area of arrest or the immediate time thereof."[37] In this case, police arrested a seriously wounded murder suspect in his mother's home. He was taken immediately to the hospital where his clothing and a blood sample taken for medical purposes were seized without a search warrant. The court

28. Commonwealth v. Murray, 19 Cumb. 2, 5 (Pa. C.P. 1968).
29. *Id.* at 6.
30. *Id.*
31. Commonwealth v. Murray, 441 Pa. 22, 27, 271 A.2d 500, 502 (1970).
32. *Id.* at 25, 271 A.2d at 501.
33. MacDonald v. United States, 335 U.S. 451, 456 (1948). This case is generally cited for the rule that a search without a warrant may be justified by the exigencies of the situation. Recent cases citing *MacDonald* are Warden, Maryland Penitentiary v. Hayden, 387 U.S. 294, 298 (1967) and Chimel v. California, 395 U.S. 752, 761 (1969).
34. Commonwealth v. Gordon, 431 Pa. 512, 246 A.2d 325 (1968).
35. 441 Pa. at 25, 271 A.2d at 501.
36. *Id.* at 26, 271 A.2d at 502 (dissenting opinion).
37. Commonwealth v. Gordon, 431 Pa. 512, 518, 246 A.2d 325, 328 (1968).

held that common sense required the police to delay the seizure until the defendant was moved to a hospital.[38] Thus, the court reasoned, the seizure and the arrest can be regarded as parts of an unbroken transaction.[39] There have been cases in other jurisdictions where a delay of up to nine days between the taking of the blood sample and the arrest was not deemed an unreasonable search *per se*.[40] Perhaps the majority in *Murray* should have made a closer examination of the facts.

The dissenting opinion was not only willing to consider the particular facts but placed great emphasis on whether the acts of the police were unreasonable.[41] Mr. Justice Pomeroy applied an "unreasonableness" test to the case in the following manner:

> I am unable to see how this solicitude for the appellant's health on the part of the police department can be said to have rendered the blood test an unreasonable search. It seems much more unreasonable to require that a person as severely injured as appellant was be placed under arrest immediately, and, in consequence, under armed guard during the period of his hospital confinement.[42]

Thus the dissent made a detailed examination of the facts and concluded that the conduct of the police was reasonable.

The question of whether the "unreasonable" term of the fourth amendment should be fitted to a ridged test or applied to each case on its particular facts is much debated. *Chimel v. California*[43] indicates a trend toward the former by establishing clear standards that a warrantless search will have to meet if it is to be proper.[44] However, Mr. Justice Black, in *Preston v. United States*[45] and *Vale v. Louisiana*,[46] has staunchly supported the idea that the fourth amendment cannot be properly applied without considering the reasonableness of the search in light of all circumstances present in the case.[47] The majority and dissenting opinions in *Commonwealth v. Murray* argued the two sides of this question as it applied to the case. The majority is in tune with the present United States Supreme Court's standards.

---

38. *Id.*
39. *Id.*
40. People v. Knox, 178 Cal. App. 2d 502, 3 Cal. Rptr. 70 (1960); State v. Kroening, 274 Wis. 266, 79 N.W.2d 810 (1956). *See generally* Annot. 89 A.L.R.2d 715 (1963).
41. Commonwealth v. Murray, 441 Pa. 22, 26, 271 A.2d 500, 502 (1970).
42. *Id.* at 27, 271 A.2d at 502.
43. 395 U.S. 752 (1969). The area which may be searched was limited to the arrestee's person and the area within his reach.
44. *See* 74 DICK. L.R. 361 (1970).
45. 376 U.S. 364 (1964).
46. 399 U.S. 30 (1970) (dissenting opinion).
47. In *Preston*, Justice Black stated that common sense dictates that the search of an automobile cannot be treated the same as an immovable house. 376 U.S. at 366-67.

In *Vale*, he reiterated his stand in *Preston* and said further that "searches are to be judged by whether they are reasonable" and "common sense dictates that reasonableness varies with the circumstances of the case." 399 U.S. at 415 (dissenting opinion).

In light of the *Murray* decision, the obvious question arises of how close in time the arrest must follow the blood taking for the taking to be "incident to the arrest." Where the offense involved is a felony, no problem is present because the arrest may be made on probable cause at the time the suspect is apprehended.[48] But in the case of a misdemeanor,[49] a police officer may not arrest on probable cause unless the offense was committed in his presence.[50] Thus in a case such as *Murray* acceptable police procedure is still undefined. It is not clear whether the search would have been incident to the arrest if the warrant for arrest had been executed the same day it was issued, which was the day following the accident. Nor is it clear whether the police are required to arrest the suspect before any search may be made.[51] If arrest is required, the same argument arises as that which militates against requiring a search warrant: during the time a warrant for either the arrest or search of the defendant is being procured, the evidence is being dissipated from the suspect's blood stream. Therefore, it would seem the police ought to be permitted to order a blood test without a warrant for either arrest or search on the "destructibility of the evidence"[52] exception to the general search warrant requirement.

It is submitted that the "search incident to arrest" rule as it is presently constituted leads to unreasonable demands on the police and unjust results in cases like *Murray*. Where the alleged offense is a misdemeanor and the evidence sought is a blood test, the taking of the blood should be approved if the requirements of *Schmerber* are met and an arrest warrant is issued and executed within a reasonable time. Twenty four hours would seem to be reasonable. This would give the police sufficient time to act and would hardly be prejudicial to an accused confined to a hospital as the defendant in *Murray* was. Hopefully the present uncertainty in this area will be removed by a thorough treatment of the issue the next time it comes before the Pennsylvania Supreme Court.

WILLIAM C. GIERASCH

48. Commonwealth v. Bosurgi, 411 Pa. 56, 190 A.2d 304 (1963), *cert. denied*, 375 U.S. 910 (1964).

49. Involuntary manslaughter is a misdemeanor in Pennsylvania. PA. STAT. ANN. tit. 18 § 4703 (1939).

50. Commonwealth v. Pincavitch, 206 Pa. Super. 539, 542, 214 A.2d 280, 282 (1965).

51. Appellant raised this issue in his brief and argued, citing Terry v. United States, 392 U.S. 1 (1968) and Sibron v. New York, 392 U.S. 40 (1968) as authority, that a search prior to an arrest is permissible only when the police are looking for weapons. Brief for Appellant at 6. However the better view seems to be that a search prior to an arrest will be allowed if reasonable grounds for the arrest existed when the officer confronted the suspect. Annot. 89 A.L.R.2d 715 (1963).

52. *See* note 24 *supra*.

CONSTITUTIONAL LAW—PENNSYLVANIA'S SURETY OF THE PEACE STATUTE IS A VIOLATION OF DUE PROCESS AND EQUAL PROTECTION

Commonwealth v. Miller, 119 Pitts. L.J. 215 (Pa. C.P. 1971)

In *Commonwealth v. Miller*,[1] the President Judge, Family Division of the Common Pleas Court of Allegheny County declared the long standing surety of the peace statute[2] unconstitutional declaring that the statute violated the due process and equal protection clauses of the United States[3] and Pennsylvania Constitutions.[4] In the decision, Judge Brosky departed from what appears to have been settled Pennsylvania law that surety of the peace is a civil proceeding.[5] After recognizing surety of the peace as a criminal proceeding, the case held that the expanded protections now afforded the criminally accused must be afforded the defendant charged with surety of the peace. This Note will analyze the nature of the offense as well as the interpretation of due process and equal protection requirements as applied in *Commonwealth v. Miller*.

James R. Miller was arrested after being accused of making threats proscribed by the surety of the peace statute.[6] At the ini-

---

1. 119 Pitts. L.J. 215 (Pa. C.P. 1971).

2. PA. STAT. ANN. tit. 19, § 23 (1964). On March 31, 1860 Pub. L. No. 427 an act to consolidate, revise and amend the laws of this Commonwealth relating to Penal Proceedings and Pleadings was passed. Under Title I of the proceedings to detect the commission of crimes, Section 6 provided:

> If any person shall threaten the person of another to wound, kill or destroy him, or do any harm in person or estate, and the person threatened shall appear before a justice of the peace, and attest, on oath or affirmation, that he believes that by such threatening he is in danger of being hurt in body or estate, such person so threatening as aforesaid shall be bound over, with one sufficient surety, to appear at the next sessions, according to law, and in the meantime to be of his good behavior, and keep the peace towards all citizens of this Commonwealth. If any person, not being an officer on duty in the military or naval service of the state or of the United States, shall go armed with a dirk, dagger, sword or pistol, or other offensive or dangerous weapon, without reasonable cause to fear an assault or other injury or violence to his family, person or property, he may, on complaint of any person having reasonable cause to fear a breach of the peace therefrom, be required to find surety of the peace as aforesaid.

3. U.S. CONST. amends. VI and XIV.

4. PA. CONST. art. 1, §§ 6, 9.

5. Commonwealth v. Taub, 187 Pa. Super. 440 (1958); Commonwealth v. Cushard, 184 Pa. Super. 193 (1957).

6. PA. STAT. ANN. tit. 19, § 23 (1964).

tial hearing, the justice of the peace found Miller guilty of surety of the peace and the peace bond was set. When the same came to trial the Common Pleas Court deemed it unnecessary to pass on the merits but considered exclusively the constitutional questions raised by the defendant. The central issue was whether a preventive justice statute could be applied without the accused being indicted by a grand jury and without trial by jury. If found guilty, the question remained whether the accused could be required to post a bond or be committed to jail for failure to post such bond.[7]

The court found the statute unconstitutional because it eliminated trial by jury as well as indictments and informations. It was held that the defendant was entitled to these procedural safeguards. The court found that the accused was incorrectly presumed guilty solely on the oath of another and exposed to possible economic discrimination.[8]

In analyzing the *Miller* decision, the history of surety bonds bears some relevance. It readily indicates the unaltered passage from the common law to the modern codes. The surety bond type of preventive justice originated in England during the reign of Edward the Third to aid the rural constabulary.[9] The first Pennsylvania statute was passed in 1700 as "an Act about Binding the Peace."[10] This act was a narrower form of preventive justice dealing with the peace bond and excluding the behavior bond. The latter form of surety action requires only a proof of ill repute and still exists in some states.[11] The Act of 1700 provided the basic text for the Act of 1860,[12] noting only the change of the populace from King's subjects to citizens of the Commonwealth. The Acts of 1909,[13] were legislated to qualify and administer the Act of 1860. It was intended to discourage the trivial use of surety of the peace. The statutory law on surety of the peace remains unchanged since the amendments in 1909.

Uniformity in the administration of surety of the peace is not the rule in Pennsylvania due to the lack of detailed procedure and the general flexibility in hearings conducted by justices of the peace and district justices.[14] The action begins with a complaint

7. 119 Pitts. L.J. 215, 216 (Pa. C.P. 1971).
8. *Id.* at 225.
9. 34 Edw. 3, c. 1 (1360).
10. 1 Smith's Laws 5 (Pa. 1700).
11. COLO. REV. STAT. ANN. § 39-2-1(1) (1963); VA. CODE ANN. § 19, 1-23 (1960).
12. PA. STAT. ANN. tit. 19, § 23 (1964).
13. PA. STAT. ANN. tit. 19, §§ 24-28.
14. PA. R. CRIM. P. (Justices of the Peace) 102-56. While these rules

sworn against the accused by the individual threatened. A warrant is issued for the arrest of the accused. Once apprehended and served with the complaint, the accused is released on an appearance bond for the hearing.[15] At the hearing, the justice of the peace first attempts a reconciliation to terminate the action. If he is unsuccessful in this required action, he then investigates the facts involved in the complaint. If the justice of the peace is satisfied that the threats were made and the complainant is in actual fear, he may then set the peace bond at a sum at his discretion.[16] The defendant must post the bond; if he will not or cannot post such bond he will go to jail. In either event, the case is bound over for the common pleas court where the action is heard de novo in a summary proceeding. If the justice of the peace's findings are sustained the bond is continued in an amount and for a duration at the discretion of the trial judge.

Pennsylvania case law on surety of the peace has been neither copious nor consistent. Few cases are reported because few go beyond the hearing and fewer beyond the common pleas trial.[17] An early reported case of nearly one hundred and fifty years ago, *Commonwealth v. Keeper of the Prison*, articulated a position nearly identical to that of Judge Brosky in *Commonwealth v. Miller*:

> The argument that a demand of surety of the peace is a more mild and merciful proceeding than a prosecution by indictment, is more specious than solid. In effect it gives to a single magistrate, a power which pertains only to a court and jury, and deprives the accused of what is his most inestimable right, the trial by jury.[18]

The same reasoning is evident in *Commonwealth v. Franklin*,[19] the first surety action to go to the superior court. This review eliminated the application of the peace bond after the acquittal of a defendant. The court held that "without a trial by a jury of his peers he found himself adjudged guilty by a judge upon a suspicion of what he might do and was placed under bond."[20] This restric-

---

suggest a structured format exists, they do not go to procedural aspects involving due process and equal protection. They simply get the defendant into court correctly.

15. PA. R. CRIM. P. (Justices of the Peace) 4001-16. (Generally describe the mechanics of setting bail bonds).

16. PA. STAT. ANN. tit. 19, § 24 (1964).

17. Many of the actions involve domestic disputes which are resolved between arrest and hearing or between hearing and trial. Another reason for the paucity of reported decisions is the failure of the trial judge to write an opinion in the summary proceeding.

18. 1 Ash. 140 (Pa. 1828?).

19. 172 Pa. Super. 152, 92 A.2d 272 (1952).

20. *Id.* at 155, 92 A.2d at 274. The court also noted the extent of the use of the surety bond in these cases:

> The Public Defender, in his excellent brief as amicus curiae, states that the Report of the Board of Inspectors of the Philadelphia County Prison for the years 1939 to 1949 indicates that in that

tion was deemed a punishment and a deprivation of his rights without due process of law.

If the suspicion of a trial judge after a full hearing is insufficient to allow punishment without trial by jury, then the suspicion of the complainant should be open to the same criticism. The superior court's fundamental aversion to imprisonment without a determination of guilt by a jury of peers is emphasized at the conclusion of *Franklin*:

> Finally we may state of record that the essentially real basis for our decision is simply that we consider the practice under review to be wrong. We are of the firm conviction that the practice is fundamentally in conflict with any modern and enlightened view of individual civil rights; that it offends the spirit and instinct, and the very letter of due process. The practice of binding after acquittal even if we were to assume a proper historical basis, which we do not, is an anachronism; it is a vestige of a social form which has passed and it cannot coexist with the modern concept of due process; it has been repealed by change.[21]

Shortly after *Franklin*, the superior court confronted the question of procedural requirements for surety of the peace in *Commonwealth v. Cushard*[22] and *Commonwealth v. Taub*.[23] The court in both instances disregarded the reasoning of *Franklin* which gave strong indication that the entire surety bond action was violative of due process.[24] The court relied on the presumption of constitutionality and the absence of indictment or jury trial for surety of the peace at common law.[25]

Any review of this reasoning must note the United States Supreme Court decision in *Schick v. United States*,[26] which held that the common law treatment of an offense which has become statutory should not bind courts when interpreting the question of the benefit of jury trial.[27] The Court noted that factors such as the

---

period 478 men, after acquittal of criminal charges, were compelled to serve an aggregate of 600 years in the Philadelphia County Prison in default of bonds aggregating $613,200.

21. *Id.* at 193, 92 A.2d 292.

22. 184 Pa. Super. 193, 132 A.2d 366 (1957).

23. 187 Pa. Super. 440, 144 A.2d 628 (1958).

24. Note, *Peace and Behavior Bonds*, 52 VA. LAW REV. 914, 920 (1966) states:

> Read in its broader sense, the *Franklin* decision declares all behavior bonds unconstitutional because they impose on persons who are presumed innocent or have been found so.

25. 187 Pa. Super. 440, 444, 144 A.2d 630 (1958).

26. 195 U.S. 65 (1904).

27. *Id.* at 66, 67.

nature of the offense and the severity of the punishment should determine the claim for a jury trial.[28] This proposition was reiterated in *District of Columbia v. Clawans*,[29] where the impact upon the accused was used in determining whether to follow the common law.[30]

These early cases evidence an apparent reluctance to utilize the surety of the peace statute and to narrowly delimit surety of the peace. One ground for the later expansive holdings may be a different interpretation of the action, as civil rather than criminal. Critical to the argument of unconstitutionality is this consideration of the nature of the surety of the peace action. This point received little attention by the court in *Miller*.[31] Judge Brosky concluded in one line that surety of the peace is criminal. Other courts and writers have held it to be a civil action.[32]

Whether other jurisdictions treat surety questions as a criminal or civil action is obfuscated by the inconsistent manner with which these courts have handled such matters as jurisdiction[33] and trial conduct.[34] Surety of the peace is unique and confusing in that the punishment is not imposed for the actions leading to the complaint but to prevent possible future offenses. The alleged actions of the accused constitute the real basis for the imposition of the bond since the threats must be found to sustain the action. Thus, the accused is de facto adjudged guilty of assault leading to the conviction under the surety action in a summary fashion by the justice of the peace.

If the Pennsylvania Supreme Court considers the impact upon the defendant as a guide, as the United States Supreme Court did in *Schick*,[35] it will likely conclude that the surety of the peace

---

28. *Id.* at 68.
29. 300 U.S. 617 (1937).
30. *Id.* at 625.
31. 119 Pitts. L.J. 215, 221 (1971).
32. 12 AM. JUR. 2D *Breach of Peace*, § 47 (1964). "Surety is not a criminal proceeding, not the prosecution for crime." Note, *"Preventive Justice"—Bonds to Keep the Peace and for Good Behavior*, 88 U. PA. L. REV. 331, 336 (1940): "Classifying proceedings for preventive justice are singularly fruitless and inconsistent."; Note, *Peace and Behavior Bonds*, 52 VA. L. REV. 918, 928 (1966): Generally the problem is having the court accept the action as a criminal proceeding.
33. Note, *"Preventive Justice"—Bonds to Keep the Peace and for Good Behavior*, 88 U. PA. L. REV. 331, 335 (1940) concluded that from a general survey of jurisdictions there could be no general rule as to the criminal or civil nature of surety from the aspect of jurisdictional requirements.
34. Deloohery v. State, 27 Ind. 521 (1967). The action is treated as a criminal proceeding in regard to defendant testifying in his own behalf. Davis v. State, 138 Ind. 11, 37 N.E. 397 (1894). The action is civil as to the instruction to the jury. Re Chambers, 221 Mo. App. 64, 290 S.W. 103 (1926). The action is criminally administered in regard to court costs. Arnold v. State, 92 Ind. 187 (1883). The action is prosecuted under a civil burden of proof.
35. *See* text accompanying note 26 *supra*.

action is criminal. While the procedure is in many ways civil,[36] the effect of the action upon the accused is similar to a criminal action. The Supreme Court of Virginia in *Fedele v. Commonwealth*[37] came to this conclusion: "The result is punishment for those persons who were unable to give security and must bear the stigma arising from commitment to jail."[38] Therefore, the court felt that the procedural safeguards afforded the criminally accused must be given one accused in the surety of the peace action.[39]

Once the surety of the peace action has been established as a criminal action, the argument for jury trial, indictments, and the criminal burden of proof flows easily from recent United States Supreme Court decisions. In *Duncan v. Louisiana*,[40] the Court declared that it was the task of the state courts to determine the procedural safeguards that need be applied:

> In the absence of an explicit constitutional provision, the definitional task necessarily falls on the courts, which must either pass upon the validity of the legislative attempts to identify those petty offenses which are exempt from jury trial or, where the legislature has not addressed itself to the problem, themselves face the question in the first instance. In either case it is necessary to draw a line in the spectrum of crime, separating petty from serious infractions.[41]

Pennsylvania's Supreme Court has already adopted such a stance with regard to indictments in *Commonwealth v. Cano*,[42] holding that the consequences to the convicted will be used to determine if indictment is necessary. The adoption of such an "impact text" demands a recognition of the relationship between the necessity of indictment and the punishment possible upon a conviction.[43] It would appear that if assault is indictable generally,[44] and specifically where the punishment is as little as a twenty-five dollar fine,[45] then surety of the peace, with its potential for much

36. Commonwealth v. Taub, 187 Pa. Super. 440, 144 A.2d 628 (1958); Commonwealth v. Cushard, 184 Pa. Super. 193, 132 A.2d 366 (1957); Commonwealth v. Franklin, 172 Pa. Super. 152, 92 A.2d 272 (1952).
37. 206 Va. 551, 138 S.E.2d 256 (1964).
38. *Id.* at 555, 138 S.E.2d at 260 (1969).
39. *Id.*
40. 391 U.S. 145 (1968).
41. *Id.* at 160. The Court in *Duncan* also indicates that had the federal courts required jury trial and indictment for the federal peace bond statute, 18 U.S.C. § 3043, the state courts would be compelled to follow. *Id.* at 149.
42. 389 Pa. 639, 133 A.2d 800 (1957).
43. *Id.* at 644, 645, 647.
44. PA. STAT. ANN. tit. 18, § 4708 (1963).
45. Commonwealth v. Moul, 79 Pa. D. & C. 316 (C.P. York 1951).

greater punishment, would necessitate an indictment. An example of the abuse possible in surety of the peace punishments is exposed by *Ex parte Fenske.*[46] There a justice of the peace required a $3500 bond. The defendant failed to post the bond and served two years in jail on the sole committing authority of the justice of the peace.[47] Thus, the surety of the peace action endangers basic liberties where persons are incarcerated as a preventive measure rather than for the commission of an actual offense, without trial by jury, or the determination of a competent court.

The United States Supreme Court has set incarceration for six months as the point at which punishment becomes severe and deserving of a jury trial in criminal cases.[48] In *Duncan*, the Court looked to the potential maximum penalty rather than the sentence imposed in the case on review.[49] Although the sixty day sentence was much less than the two year maximum sentence, it was the potential for the two years penalty that made the Court deem the action worthy of the procedural safeguards of a serious crime.[50] Even if the nature of surety of the peace is not accepted as strictly criminal, the criminal standard may be applied. The Supreme Court indicated this in regard to contempt actions:

> Criminally contemptuous conduct may violate other provisions of criminal law; but even when this is not the case convictions for criminal contempt are indistinguishable from ordinary convictions, for their impact on the individual is the same.[51]

In an effort to protect the accused from "corrupt and overzealous prosecutors and against the complaint, biased or eccentric judge,"[52] the Supreme Court has strongly emphasized the desirability of jury trials in much the same way as the Pennsylvania Superior Court did in *Commonwealth v. Franklin.*

Once surety of the peace is accepted as worthy of criminal procedure enforcement of a criminal burden of proof would be only logical. In many jurisdictions the burden is merely a preponderance of the evidence and not the criminal standard of beyond a reasonable doubt.[53] The civil burden of proof was found by Judge Brosky to be the practice in Pennsylvania.[54] The offense of assault

---

46. 148 Kan. 161, 79 P.2d 829 (1938).
47. *Id.*
48. Cheff v. Schnackenberg, 384 U.S. 373 (1966).
49. Duncan v. Louisiana, 391 U.S. 145 (1968). The Court held that the 60 day sentence could not be imposed without a trial by jury.
50. Article, *The Supreme Court 1967 Term,* 82 HARV. L. REV. 63, 149 (1968).
51. Duncan v. Louisiana, 391 U.S. 145 (1968). The Court went on to conclude that a trial by jury was necessary because of the impact upon the defendant.
52. *Id.* at 156.
53. 12 AM. JUR. 2d, *Breach of Peace,* § 47 (1964).
54. Commonwealth v. Miller, 119 Pitts. L.J. 215, 221 (Pa. C.P. 1971). Judge Brosky also believes the burden of proof is shifted to the accused to show his innocence.

requires the prosecution to prove the guilt of the accused beyond a reasonable doubt.[55] Since the showing of the equivalent of assault is necessary to sustain the surety of the peace action,[56] it would seem that the same burden ought to be employed. The rationale for the less difficult burden of proof is that the courts should aid the one seeking to prevent crime.[57] This reasoning should be weighed against the general policy against incarceration without an adjudication of guilt.[58]

In addition to finding that the Pennsylvania surety of the peace statute violated due process, Judge Brosky also held that the statute is a violation of equal protection provisions[59] of the United States and Pennsylvania Constitutions.[60] This proposition is founded on the varying impact upon the defendant due solely to his financial ability. Upon the decision of the justice of the peace to place the accused under bond, the defendant is confronted with three different punishments contingent upon the amount of capital he can or cares to muster. If the accused has the means to post his own bond, he will suffer only the loss of the use to the capital while under the bond. For the less financially able, the punishment will take the slightly more onerous form of the premium he must pay to the professional bail-bondsman who will provide the bond. Finally, for the indigent defendant who is unable to pay the premium, there is incarceration for at least the period between the initial hearing and the common pleas trial. Upon affirmation of the findings of the justice of the peace, the period of incarceration will be set anew.

In attacking the disparate results due solely to economic considerations, the court in *Miller* relied mainly on *Griffin v. Illinois*[61] where the United States Supreme Court declared that in criminal appeals a court cannot discriminate economically anymore than it can on the basis of race or religion. In *Griffin*, the defendants could not afford the required printing costs to secure a required transcript for the review of their conviction. The Supreme Court held that the likelihood of reversible error should be the determining factor in taking appeals, not the defendants ability to meet the costs. The Court concluded that freedom should not have a price tag.[62]

---

55. Commonwealth v. Franklin, 160 Pa. Super. 484, 52 A.2d 230 (1947).
56. PA. STAT. ANN. tit. 19, § 23 (1964).
57. Arnold v. State, 92 Ind. 187 (1883).
58. Williamson v. United States, 184 F.2d 180 (2d Cir. 1950).
59. U.S. CONST. amend. XIV.; PA. CONST. art. 1, § 9.
60. 119 Pitts. L.J. 215, 222 (1971).
61. 351 U.S. 12 (1955).
62. *Id.* at 18, 19.

While the theory of *Griffin* is one basis to attack the failure of equal protection under the statute, Judge Brosky could have found additional support in two related areas. One argument is that the peace bond should be administered in light of Supreme Court dictated requirements for bail and bond generally. In *Stack v. Boyle*,[63] the court held that the bond may not exceed the minimum amount necessary to achieve the desired purpose.[64] The appearance bond should require an amount sufficient to insure appearance at trial and no more. In interpreting federal bail procedure, the court noted that bail was used to prevent infliction of punishment prior to a determination of guilt.[65] The problem arises whether the purposes of surety of the peace may be achieved without an incarceration before a conviction. Is there a sum small enough for the bond to be within the indigent defendant's means but large enough to act as a deterrent and satisfy the purpose of the actions? It may be contended that the defendant in the surety action ought to be given the opportunity to make a reasonable bond like other criminally accused persons not convicted.[66] The policy against incarceration prior to criminal conviction was articulated before *Stack* in the federal courts.[67] The effect of the surety of the peace action upon the indigent defendant appears incompatible with the policy of these decisions.

Secondly, imprisonment in lieu of bond is analogous to imprisonment for inability to pay a fine. The Supreme Court held it violative of due process to jail the defendant in *Tate v. Short*[68] for failure to pay fines due to financial inability. In explaining the decision, the Court stated: "In each case, the constitution prohibits the state from imposing a fine as a sentence and automatically converting it into a jail term solely because the defendant is indigent and cannot forthwith pay the fine in full."[69] In the instance of the peace bond, the inability to pay the bondsman's premium is automatically converted into a prison term. This economic discrimination is more alarming in the surety of the peace situation since the person jailed has not been charged, tried or convicted of any crime. An alternative to immediate payment is the payment of smaller sums on an installment plan in accordance with the Act of 1917.[70]

---

63. 342 U.S. 1 (1951).
64. *Id.* at 6.
65. *Id.* at 7.
66. 342 U.S. 8 (concurring opinion). Mr. Justice Frankfurter concurring stated: "On the contrary, the spirit of bail is to enable them to stay out of jail until a trial has found them guilty."
67. *See* note 58 *supra.*
68. 91 S. Ct. 668 (1971).
69. *Id.* at 671.
70. PA. STAT. ANN. tit. 19, § 953 (1964); *see also*, ABA MIN. STAND. FOR CRIM. JUSTICE, *Sentencing Alternatives* § 27(b), 117-23 (Approved Draft 1969).

The entire thrust of the Brosky opinion in *Miller* and the supporting decisions used to develop his basis for the finding of unconstitutionality is *a posteriori*. Judge Brosky and the other courts looked beyond what the law had been as to due process as dictated by statute or common law to examine the impact of this procedure on the accused. From this determination, the courts reason back to what the due process safeguards ought to be to satisfy current interpretations of constitutional requirements. The need to reexamine due process and the evolutionary nature of due process was expounded by Justice Frankfurter in *Griffin*: "Due Process is, perhaps, the least frozen concept of law, the least confined to history and the most absorptive of powerful social standards of a progressive society."[71] Society may have evolved so that the surety of the peace action will take a place beside stocks and pillories as a method of criminal justice.

In reviewing the constitutionality of the surety of the peace statute, the Pennsylvania Supreme Court will be equipped with the superior court decision in *Commonwealth v. Franklin* that one should not be jailed for failure to post bond after acquittal under the surety of the peace statute.[72] In addition it will have the general mandate issued by the United States Supreme Court in *Duncan v. Louisiana* that the courts have a responsibility to determine at what point an offense reaches a level of seriousness which requires all the procedural safeguards of a criminal proceeding.[73] Finally, the prior adoption by the supreme court of an "impact test" with reference to indictments in *Commonwealth v. Cano*[74] paves the way for a determination by the court that the surety of the peace statute, as presently administered, violates due process. The court will also have to consider the argument that the peace bond system of preventive justice violates equal protection. The fact that surety of the peace inflicts more severe punishment on the poor than it does on the rich must be examined in light of the standards for testing due process that have evolved in recent years. It is submitted that the potential for unequal and at times unjust punishment without benefits traditionally afforded an accused, renders a decision by the Supreme Court affirming *Commonwealth v. Miller* desirable.

PAUL LASKOW

---

71. Griffin v. Illinois, 351 U.S. 12, 20 (1955) (concurring opinion).
72. 172 Pa. Super. 152, 92 A.2d 272 (1952). *See* text accompanying note 19, *supra*.
73. *See* text accompanying notes 40-41 *supra*.
74. *See* text accompanying notes 42-43 *supra*.